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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 576

CAPTAIN HOWARD BRETT LEVY, for himself and for all others similarly situated,

Petitioners,

—v.—

HONORABLE HOWARD F. CORCORAN, United States District Judge,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES MORGAN, JR.
LAUGHLIN MCDONALD
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

MELVIN L. WULF
ALAN H. LEVINE
ELEANOR HOLMES NORTON
156 Fifth Avenue
New York, New York 10010

LAWRENCE SPEISER
RALPH J. TEMPLE
1424 16th Street, N.W.
Washington, D. C. 20036

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa. 19104

Attorneys for Petitioner

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HONORABLE HOWARD F. CORCORAN, United States District Judge,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on May 9, 1967, Chief Judge Bazelon dissenting. The judgment sought to be reviewed denied petitioner's application for a writ of mandamus to compel the Honorable Howard F. Corcoran, a judge of the District Court, to request convening of a statutory three-judge court in a matter pending before him, styled *Levy, etc.* v. *McNamara, et al.*, D. D. C., C. A. No. 953-67. Rehearing in the mandamus action was denied June 7, 1967.

Opinions Below

The opinion of the District Court in the underlying action, *Levy, etc.* v. *McNamara et al.*, is not reported. It is set forth in the Appendix, pp. 37-45, *infra*. The District Court's order appears in the Appendix, at p. 43, *infra*. The order and opinions of the Court of Appeals denying petitioner's application for a writ of mandamus are not yet reported. That order together with the separate opinions of Circuit Judges Tamm and Leventhal and Chief Judge Bazelon (dissenting) are set forth in the Appendix, pp. 46-69, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered May 9, 1967. Motion for rehearing was denied by the Court of Appeals on June 7, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) (1964).

Questions Presented

Petitioner's complaint in the District Court sought the injunction of three Articles of the Uniform Code of Military Justice on the ground that they were vague and overbroad and had been discriminatorily applied to suppress free speech protected by the First Amendment. Restraint of petitioner's court martial, wherein he was charged with military crimes for acts protected by the First Amendment was also sought. The District Court declined to convene a statutory three-judge court on the ground that a civil court

"has no jurisdiction . . . to interfere with the operation of the military." The Court of Appeals denied mandamus.

(1) Did the Court of Appeals apply a proper standard under 28 U. S. C. §2282 (1964) in holding that a single district judge could preempt three-judge consideration of the question whether civil courts have "jurisdiction" to enjoin military statutes and prosecutions that exert a "chilling effect" upon First Amendment freedoms?

(2) Is this Court's decision in *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), so conclusively inapplicable to military prosecutions that a three-judge court need not be convened to consider the question of first impression whether military penal statutes overreaching First Amendment freedoms can be enjoined by a federal district court?

Constitutional and Statutory Provisions Involved

This case involves the First Amendment to the Constitution of the United States.

This case also involves 28 U. S. C. §2282 (1964), as follows:

> §2282. *Injunction against enforcement of Federal statute; three-judge court required.*
>
> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

The case further involves Articles 90, 133 and 134 of the Uniform Code of Military Justice, 10 U. S. C. §§890, 933, and 934 (1964), respectively as follows:

§890. *Assaulting or willfully disobeying superior commissioned officer.*

Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

§933. *Conduct unbecoming an officer and a gentleman.*

Any commissioned officer, cadet, or midshipman who is convicted for conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

§934. *General article.*

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offence, and shall be punished at the discretion of that court.

Statement of the Case

Petitioner Howard B. Levy was a medical doctor serving as a Captain in the Army and assigned to be in charge of the Dermatology Clinic in the United States Army Hospital at Fort Jackson, South Carolina. He disagreed with the Administration's position in Viet Nam. He expressed this disagreement in a number of conversations between February and December 1966, which were heard by Army Special Forces personnel at the hospital. On these occasions he uttered (or was later charged with uttering) language ranging in temperance from "the United States is wrong in being involved in the Viet Nam war" to "Special Forces personnel are . . . killers of peasants and murderers of women and children." He said that Negroes were discriminated against in the United States, and that they should refuse to go to Viet Nam or to fight in Viet Nam. Previously, in September 1965, he had written a letter to a soldier stationed in Viet Nam expressing the same views.

In December 1966, military prosecutions were begun against Levy, charging that his conversations were criminal. As the charges subsequently developed, they asserted that those conversations violated Articles 133 and 134 of the Uniform Code of Military Justice (U. C. M. J.), p. 4 *supra*. Article 133 makes criminal "conduct unbecoming an officer and a gentleman." Article 134 is the catch-all provision of the U. C. M. J., penalizing "all disorders and neglects to the prejudice of good order and discipline . . . , all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital" which are not elsewhere "specifically mentioned" in the Code. Levy's let-

ter to the soldier in Viet Nam was later made the basis for two additional charges under Articles 133 and 134. Also, Levy was charged under Article 90 of the Code with failing to obey an order to train Army Special Forces personnel in dermatology. (Levy's version of this latter affair is that he declined to participate in a program that required him, as a doctor, to expose the private parts of female military dependants, under his treatment, to viewing by non-medical corpsmen; and that, in any event, the Article 90 charge was being maintained, not to punish him for disobedience, but as a device to intimidate and harass him because of his criticism of the Viet Nam war and his supposed subversive character.)

On April 17, 1967, prior to his trial by court martial, Levy filed in the United States District Court for the District of Columbia an action styled *Levy, etc.* v. *McNamara et al.*, C. A. No. 953-67. The action challenged the constitutionality of Articles 133 and 134, on their face and as applied to suppress free expression, contending that those articles failed to meet the "strict" standard of permissible statutory vagueness applicable in the First Amendment area. *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 432 (1963). Levy alleged that the speech conduct for which he was charged was constitutionally protected and that his prosecution was selective and discriminatory and designed to stifle criticism of the Administration's position in Viet Nam. As to the charge under Article 90, Levy asserted that this, like the charges under Articles 133 and 134, was being employed as an instrument of political repression and harassment. The suit was brought as a class action, on behalf of Levy and other persons similarly situated—i.e., military personnel who wished to criticize the United States

policy in Viet Nam but were intimidated in the exercise of their right of free expression by the threat of prosecutions like Levy's. It sought (1) declarations of the unconstitutionality of Articles 133 and 134 on their face and as applied; (2) injunction of enforcement of these articles; (3) a declaration of the unconstitutionality of Article 90 as applied to suppress free speech; (4) an injunction of the enforcement of Article 90 as so appplied; and (5) preliminary and permanent injunction of Levy's court martial, scheduled to begin on May 10, 1967, on the ground that this prosecution would have a "chilling effect" on free speech within *Dombrowski* v. *Pfister,* 380 U. S. 479, 487 (1965). Levy accompanied his complaint with an application for a preliminary injunction, also filed April 17.

Since federal statutes were sought to be enjoined as unconstitutional, a three-judge court was requested under 28 U. S. C. §2282 (1964). The defendants, however, opposed the convening of a statutory three-judge court. While conceding that Levy was being prosecuted as alleged, under Articles 133, 134 and 90, and that the charges under Articles 133 and 134 were based upon speech conduct in the nature of conversations and a private letter, the defendants urged that a three-judge court was not required because, *inter alia,* the district court lacked "subject matter jurisdiction," Levy had not exhausted his military remedies, no irreparable injury justifying equitable relief was shown, there was no justiciable controversy, and the statutes under which Levy was prosecuted were constitutional.

Instead of "immediately" notifying the Chief Judge of the Circuit of the pendency of an action requiring a court of three judges, 28 U. S. C. §2284(1) (1964), District Judge Corcoran set the case for argument on April 28 on Levy's

motion for a preliminary injunction and the defendants' objections thereto and to the convening of a three-judge court. At that hearing, counsel for Levy, noting that the May 10 date on which the court martial was scheduled to begin was fast approaching, and that a preliminary injunction to restrain the enforcement of a federal statute on grounds of unconstitutionality could not be issued by a single judge, moved orally for a temporary restraining order, pursuant to 28 U. S. C. §2284(3) (1964), until such time as a court of three judges could meet to hear the application for a preliminary injunction.

On May 3, 1967 Judge Corcoran issued his opinion and order, adopting the view of the defendants that the court lacked "subject matter jurisdiction" of the cause, and therefore denying Levy's application for a preliminary injunction and declining to initiate proceedings for the convening of a statutory three-judge court. That opinion is set forth in the Appendix, pp. 37-43, *infra*.

On May 8, 1967 Levy commenced the present proceeding by filing his petition for a writ of mandamus in the Court of Appeals for the District of Columbia Circuit, asking that Judge Corcoran be ordered to convene a three-judge court in *Levy, etc.* v. *McNamara et al.*, conformably to law.[1] Contemporaneously with the filing of the petition for mandamus, Levy filed an application for a stay, asking that the Court of Appeals restrain the court martial proceeding against Levy, scheduled for May 10, pending disposition of the mandamus action and the convening of a three-judge

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[1] This form of procedure is appropriate in the District of Columbia Circuit. See *Reed Enterprises* v. *Corcoran*, 354 F. 2d 519 (D. C. Cir. 1965).

court to hear the application for a preliminary injunction in *Levy, etc.* v. *McNamara et al.*

At 11:30 a.m. on May 9, the mandamus action was heard by a motions panel of the Court of Appeals (Chief Judge Bazelon and Circuit Judges Tamm and Leventhal). At about 9:30 p.m. on the same date, the court entered its order (Chief Judge Bazelon dissenting), denying both the petition for mandamus and the application for a stay. Each of the members of the panel filed a statement in connection with the order. Judge Tamm was of the view that the district court lacked jurisdiction to enjoin a court martial, since military review procedures and post-conviction *habeas corpus* were the exclusive remedies for one whose constitutional rights were violated by a military prosecution. Judge Leventhal apparently believed that the district court had jurisdiction, but was of the opinion that the adequacy of military remedies and conceptions of separation of powers as between military and civil authority required the conclusion that Levy's complaint stated no claim for equitable relief by injunction. Accordingly, refusal to convene a three-judge district court was held proper. In dissent, Chief Judge Bazelon reviewed the authorities and concluded that neither the question of jurisdiction, or that of equity, nor any other defense raised against Levy's suit was so clearly settled in law as to permit its resolution by a single district judge, in the face of the congressional command that such matters be heard by a three-judge district court. Taking his cue from *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713 (1962), Judge Bazelon noted the extremely restricted role of the single district judge in three-judge litigation. "When an application for a statutory three-judge court is addressed to a district court,

the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." *Id.* at 715. Applying this standard, Judge Bazelon thought it plain that Levy's complaint was the stuff for three-judge adjudication, "and the applicable jurisdictional statute therefore made it impermissible for a single judge to declare the merits of the case, either by granting or withholding relief." *Ibid.* It followed that a stay of the court martial should have been granted, lest the district court's erroneous refusal to summon three judges have the practical effect of totally "withholding relief." The order of the Court of Appeals and the statements filed in connection with it are set forth in the Appendix, pp. 46-53, *infra*.

Application for a stay, pending petition for certiorari, was made to Chief Justice Warren, as Circuit Justice for the District of Columbia Circuit, on May 10, 1967, in a last-minute effort to restrain the court martial scheduled to begin that same morning. The stay application was referred by the Chief Justice to the Conference, and was denied by the Court on May 22, 1967, after the commencement of petitioner Levy's military trial.

Immediately thereafter, a petition for rehearing was filed in the Court of Appeals. That petition emphasized that the restraint of Levy's particular court martial was only one—albeit the most immediate—object of the *Levy* v. *McNamara* lawsuit. It pointed to the prayers for injunctive and declaratory relief against the challenged sections of the U. C. M. J., and it adverted to the continuing *in terrorem*

effect of Articles 133 and 134 upon the exercise of free speech by military personnel. It urged that the Court of Appeals reconsider, unembarrassed by the pressures of the original litigation in that court designed to stave off Levy's court martial, whether a three-judge court was not required to hear Levy's class-action claims against the general use of Articles 90, 133 and 134 to suppress the expression of unpopular views in the military. Rehearing was denied June 7th.

The following matters, although not of record herein, may be thought pertinent by the Court in determining this petition for certiorari. They are matters of public record in cases pending or concluded in the lower courts.

Captain Levy was convicted June 2, 1967 by a general court martial for violation of Articles 90, 133 and 134. He was sentenced to three years confinement at hard labor, dismissal from the service and forfeiture of all pay and allowances. His case is presently wending its way through the many stages of required military appeals. Since his conviction Captain Levy has been confined, under guard, in the United States Army Hospital at Fort Jackson.

A request for bail or other release from confinement pending appeal was made to his commanding officer, General E. B. Roberts. Even though officers are generally not confined while a court martial conviction is being reviewed except in cases of heinous crimes, General Roberts, on June 3 and again on June 12, ordered that Levy's confinement be continued. His stated considerations at this time were, principally, the purported impact that Levy's freedom

might have upon the morale and discipline of military personnel, and concern for Levy's safety. The Secretary of the Army was asked to review this decision. He declined to do so.

Petitions for writs of habeas corpus, bail pending appeal or relief in the nature of mandamus were addressed to the United States Court of Military Appeals and to the United States District Court for the Eastern District of South Carolina. The District Court held on July 6 that, the matter of bail was entirely within the discretion of the commanding officer, and denied *habeas corpus*. *Levy* v. *Resor*, E. D. S. C., C. A. No. 67-442, decided July 6, 1967. On July 7 the petition for the writ was also denied by the Court of Military Appeals. *Levy* v. *Resor*, U. S. C. M. A., Misc. No. 67-9, decided July 7, 1967.

Attached to the government's return and answer to the petitions for habeas corpus or bail in both actions was an affidavit of General Roberts, sworn July 26, alleging that he had learned from a confidential source, on May 31 (when Captain Levy was not under confinement), that Levy had told a close associate that if convicted he planned to apply for bail, flee to a communist country, seek political asylum, denounce the United States, and subsequently return to this country, where he expected to be received in view of the country's lenient treatment of defectors. The General also alleged that Captain Levy was affiliated with the Socialist Workers Party. Finally he intimated that the petitioner had suicidal tendencies. Since neither in the Court of Military Appeals nor in the South Carolina District Court had Levy had an evidentiary hearing on his petitions for bail, he filed a Motion for Reconsideration in the District Court, putting into issue the truth of the statements made by Gen-

eral E. B. Roberts. Captain Levy denied all of the allegations of the Roberts affidavit and asserted that the story of his plans to flee and seek political asylum in a communist country had been "concocted from whole cloth." The Motion for Reconsideration was denied July 10. Levy noted his appeal to the Court of Appeals for the Fourth Circuit. The District Court has denied his application for bail pending the appeal.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to review the standard employed by the District Court and the Court of Appeals to determine the scope of the issues that may be decided by a single judge in three-judge litigation.

Petitioner Levy's complaint for injunctive and declaratory relief in the district court had several obvious hurdles to surmount. First, there was the question that District Judge Corcoran characterized as a matter of "subject matter jurisdiction": whether a civil court has power to restrain the enforcement of military penal laws, and to enjoin a court martial? Second, there was a congeries of other threshold questions best described as matters of "equity" or "equitable jurisdiction": whether there was an adequate showing of irreparable injury, inadequacy of legal remedies, exhaustion of other remedial processes, etc.? Third, there was the merits of the controversy. By the nature of the thing, obviously, most litigations subject to the three-judge statutes, 28 U. S. C. §§2281-2284, pose a similar register of issues.

Judge Corcoran did not reach the merits. He declined to entertain the lawsuit, or to summon a three-judge court to entertain it, on grounds expressly couched in terms of "jurisdiction" but which also might be conceived under the rubric of "equity." However this may be, the characteristics of the grounds of his decision were these: (1) The issue he decided had not previously been determined by a controlling decision of this Court, nor was its resolution a matter of relatively simple deduction from closely analogous decisions of the Court. (2) The issue had not been determined by a uniform body of lower court decisions; indeed, it was properly a matter of first impression. (3) The arguments in favor of the district court's jurisdiction (or of equity) were not palpably trivial; they rested upon a recent epochal decision of this Court, *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), whose scope has not yet been fully resolved but whose purport had strong and obvious relevance (as we shall show in the next section of this Petition) for the argument in favor of jurisdiction (or equity), to support which it was cited. The issue to be determined therefore, was one which confronted the district court as *res nova,* and required it to chart the lines of probable progression of a relatively fresh decision by this Court, whose general implications and development were not yet clear. Specifically, that issue was: does *Dombrowski* authorize the federal civil injunction of military penal statutes and prosecutions alleged (and with obvious sound basis) to overreach the First Amendment freedoms?

Judge Corcoran decided that issue alone, without convening a statutory three-judge court. The importance of his decision for the development of *Dombrowski* and of the relationship between the civil and military jurisdictions of

the United States is discussed in the next section. What we emphasize here is its significance for the administration of the three-judge scheme enacted by Congress as the procedural vehicle for litigation of controversies such as this one.

This Court's decisions under the three-judge laws establish several basic points, we believe. First, in a suit meeting the formal requirements of §2281 or §2282 (an action against a state or federal official seeking restraint of the enforcement of a state or federal statute, as the case may be, on grounds of its unconstitutionality), one judge may no more deny relief than he may grant it. *Ex parte Metropolitan Water Co.*, 220 U. S. 539 (1911); *Ex parte Northern Pacific Ry. Co.*, 280 U. S. 142 (1929). Second, this is true even though the denial of relief may be placed on some threshold ground—jurisdiction, equity, abstention, etc.—rather than on the merits. *Stratton* v. *St. Louis Southern Ry. Co.*, 282 U. S. 10 (1930); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, 715 (1962). Third, a single district judge may deny, or he may grant, relief where the constitutional controversy on the merits is illusory—put another way, where the constitutional issue is frivolous. *Ex parte Poresky*, 290 U. S. 30 (1933); *Bailey* v. *Patterson*, 369 U. S. 31 (1962). The converse of frivolity has been spoken of as a "substantial" constitutional question, as in the Court's aphoristic summary in *Idlewild Bon Voyage*, *supra*, 370 U. S. at 715, restricting single-judge consideration to the issues: "whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

The third determination doubtless means nothing more than a screening to assure that the statutory requisites respecting parties, relief sought, and the nature of the controversy are met. The first, relating to the substantive constitutional question, is explicated by *Poresky, supra,* and *California Water Service Co.* v. *City of Redding,* 304 U. S. 252, 255 (1938), and has been adequately implemented by the Courts of Appeals. E.g., *Reed Enterprises* v. *Corcoran,* 354 F. 2d 519 (D. C. Cir. 1965); *Stamler* v. *Willis,* 371 F. 2d 413 (7th Cir. 1966). It remains, however, quite unclear whether the second determination, relating to equity (and to jurisdiction, where that is not obvious) is intended to be governed by the same standard of "substantiality" as the first, or by a stricter or laxer standard. See Currie, *The Three-Judge District Court in Constitutional Litigation,* 32 U. CHI. L. REV. 1, 20-29 (1964). We believe that the purposes of the three-judge statute, as explicated in the Court's decisions, call for the same standard; that is, that in matters of "jurisdiction" and "equity" as well as on the merits, a single district judge may decide an issue only if it is frivolous or unsubstantial.

But we suggest it is palpable that District Judge Corcoran and the Court of Appeals below either (1) did not apply this standard in the present case, or (2) held that a question may be "frivolous" although it has the characteristics described in the second paragraph of this section, *supra* —i.e., is a question of first impression whose resolution involves considerable extrapolation from a recent, innovative decision of this Court. Either possible ground of decision is vitally important and, we submit, merits review here. This is so for several reasons.

The history of the Court's development of constitutional law in recent decades (the law, of course, which exclusively is involved to invoke three-judge procedures) has been a story of increasing availability of federal judicial remedies for the deprivation of the constitutional rights of the citizen. The reapportionment decisions, *Bond* v. *Floyd*, 385 U. S. 116 (1966); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), and *Dombrowski* itself are among the foremost examples. In this state of development, to permit the district judges, sitting alone, to throw out otherwise proper three-judge actions under a standard (or citerion of "frivolity") which preempts three-judge consideration of complaints seeking sorts of constitutional redress that are concededly novel but visibily supported by recent doctrinal trends in the Court's decisions—on no stronger basis of rejection than that they *are* novel—is intolerable.

This is the more true because of the modern-day evolution of the three-judge court. Originally designed to protect statutes against precipitate invalidation by district judges, the three-judge court mechanism has more lately come to be an important instrument for the protection of the citizen against unconstitutional legislation (particularly of the States). The influence of the circuit judges in this development is a matter of common knowledge. The importance of the immediate convening of a statutory court under §2284, particularly in civil rights and civil liberties cases, is therefore enormous. It is so particularly because preliminary relief is often required in those cases, and often required with urgency. The present case is a classic instance of the need for such relief—and of the complete frustration of needed interim relief by reason of the failure to follow the required statutory procedure. The

case is, therefore, a peculiarly appropriate vehicle for the Court to clarify and enforce the procedures mandated by §§2281-2284. In addition, the range of threshold issues presented here, and their problematic characterization as "jurisdictional" or "equitable," provides an extraordinary opportunity for plenary consideration of the role of the single judge in three-judge controversies. See the discussion of the range of unsettled questions bedeviling administration of the three-judge statutes in *Currie, supra,* at 24-26, 28-29.

II.

Certiorari should be granted to determine whether the rule of *Dombrowski* v. *Pfister* applies to military penal legislation and military prosecutions.

At the heart of this litigation is the question whether *Dombrowski* v. *Pfister,* authorizing federal injunction (in at least some circumstances) of state penal statutes and criminal prosecutions that broadly overreach First Amendment freedoms, authorizes by parity of reasoning (and under similar circumstances) the injunction by a federal court of military penal statutes and criminal prosecutions having a similar "chilling effect" on constitutionally protected expression. In short, does *Dombrowski* apply to the military? The courts below answered that question in the negative (Chief Judge Bazelon dissenting). Several aspects of their answer deserve brief emphasis at the outset, before we pass to the reasons why it merits review by this Court.

Initially, it is significant that the decisions below rejecting the application of *Dombrowski* in military matters,

were made on the face of petitioner's complaint, before answer, and hence without giving petitioner any opportunity for factual development of his case. In this posture of the litigation, those decisions necessarily hold that no provable state of facts—even facts identical to those of the *Dombrowski* case itself—could bring a military penal statute or prosecution within the rule of *Dombrowski*. Indeed, the opinions supporting the decisions state this proposition rather baldly; their rationale is a categorical hands-off-the-military.

In addition, the determination that this doctrine could properly be announced by a single judge in a three-judge lawsuit necessarily assumes—even under the most liberal view of the powers of one judge in three-judge matters—that the doctrine is pretty plainly right. The decisions below, then, establish that *Dombrowski* has *no* application to the military, and that it *clearly* has no application to the military. Subsequent suits by military personnel to enjoin military penal legislation, whatever the nature of the legislation or the circumstances of the suit, may expect short shrift. One can realistically predict that they will be the object of routine and relatively unconsidered orders of dismissal, at least in the District of Columbia. And the District is, of course, the necessary place of venue of most such suits, and the logical place of venue of nearly all.

These considerations intensify, we believe, the force of the following reasons why the *Dombrowski* issue should be reviewed by this Court now, and in petitioner's case.

A. *The* Dombrowski *issue is a question of first impression and of vital importance to the constitutional protection of vast numbers of American citizens.*

In *Dombrowski* this Court concluded that the threat of state prosecutions under vague statutes overreaching First Amendment freedoms so oppressively restrained the exercise of those preferred freedoms, that immediate federal injunctive and declaratory relief was required to protect them. In this limited but crucial area, the Court therefore subordinated the competing (and elsewhere compelling) considerations that ordinarily caution against federal judicial intervention into unconcluded state criminal proceedings—the considerations that underlie the abstention doctrine, the exhaustion doctrine, the doctrine of *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943), and that of *Stefanelli* v. *Minard*, 342 U. S. 117 (1951), and *Cleary* v. *Bolger*, 371 U. S. 392 (1963). These latter considerations had long been given great weight by the Court, as any reading of the cited decisions unmistakably shows. Together they had respected with impressive continuity the conception that the state courts constituted a system of "'distinct and independent tribunals'" with which the federal judiciary steadfastly declined to interfere. *Ex parte Royall*, 117 U. S. 241, 252 (1886). Nonetheless, the extraordinary danger posed by dragnet state criminal legislation to the "delicate and vulnerable . . . supremely precious" freedoms of the First Amendment[3] required extraordinary federal judicial remedies for their protection; and *Dombrowski* authorized those remedies, to the full extent of the need

[3] *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 433 (1963).

for them, even at the cost of some federal intrusion into the bailiwick of the state courts.

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. . . . When the statutes also have an overbroad sweep, . . . the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of these rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. . . . For '[t]he threat of sanctions may deter * * * almost as potently as the actual application of sanctions * * *' . . . Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." 380 U. S. at 486.

On the face of it, this logic of *Dombrowski* applies as well to military penal legislation having an "overbroad sweep" in the First Amendment area as to similar state penal legislation. True it is that the institution of the military, and the military courts, have long been recognized as a system separate and apart from the federal civil courts, and ordinarily immune against intrusions by them. But so have the institution of the States, and the state courts. The traditional autonomy of the military

tribunals has had its exact parallel in state judicial autonomy, and that parallel has several times been explicitly drawn by opinions of this Court in military cases. *Gusik* v. *Schilder*, 340 U. S. 128, 131-132 (1950); *Burns* v. *Wilson*, 346 U. S. 137, 140, 142 (1953). The *Dombrowski* holding marks the limitation of one of those parallel autonomies under our constitutional scheme of government; and the question arises whether it does not also mark the limitation of the other. That question is one of first impression in this Court. It is the question squarely presented by petitioner Levy's case. We submit it is an important and vitally timely question, which the Court should grant *certiorari* to decide.

One measure of its importance is the number of persons potentially affected by it. The Office of Information, Department of Defense, informs us that on June 30, 1966, active military personnel for all services numbered 3,093,356—a figure greater than the populations of twenty-nine American States. In addition, on the same date, the Ready Reserves (inactive) numbered 1,965,626; the Stand-by Reserves, 467,650; and those retired, 335,000. The significance of these figures, and of other more subtle indicators of the role of the modern military establishment in contemporary life, has been described by the Chief Justice:

> ". . . events quite unrelated to the expertise of the judiciary have required a modification in the traditional theory of the autonomy of military authority.
>
> "These events can be expressed very simply in numerical terms. A few months after Washington's first inauguration, our army numbered a mere 672 of the 840 authorized by Congress. Today, in dramatic

contrast, the situation is this: Our armed forces number two and a half million; every resident male is a potential member of the peacetime armed forces; such service may occupy a minimum of four per cent of the adult life of the average American male reaching draft age; reserve obligations extend over ten per cent of such a person's life; and veterans are numbered in excess of twenty-two and a half million. When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question." Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. Rev. 181, 187-188 (1962) (The James Madison Lecture, 1962).

A second measure of the question's importance—a distressing one—is the accumulating evidence that military prosecutions are being used broadly to stifle the freedom of expression of servicemen. The articles of the U. C. M. J. challenged by petitioner Levy in the present case seem to be particularly serviceable for the purpose. Just last month, for example, the Court of Military Appeals sustained the court-martial conviction of Army Second Lieutenant Henry H. Howe, Jr., for violations of Article 133 and Article 88 ("contemptuous words against the President") on the basis of Howe's participation in a peace demonstration in November 1965, while off duty and in civilian clothes. Howe walked in a line of demonstrators carrying a placard that said, "End Johnson's Fascist Aggression in Viet Nam," on one side and, "Let's Have More Than A Choice Between Petty Ignorant Fascists in 1968," on the other. *United States* v. *Howe*, U. S. C. M. A. No. 19846, decided August

4, 1967. The prosecution and conviction of Private Andrew D. Stapp at Fort Still, Oklahoma, for refusing to obey an order to open his foot locker and disclose the allegedly radical reading material he kept inside, has received national notoriety. See *New York Times,* May 31, 1967, 53:5; June 2, 1967, 6:4. Other military arrests and prosecutions for anti-war protest activity and related offenses are also increasingly reported. See, e.g., *New York Times,* January 22, 1966, 6:4; July 8, 1966, 1:2; July 15, 1966, 3:2.

Third, the "chilling effect" of such prosecutions cannot be overstated. Petitioner Levy's case presents an extraordinarily vivid example.[3]

Following his failure to obtain injunction of his military trial, Captain Levy was tried by a court martial composed solely of career officers of rank superior to him. The majority of those who tried him were from the South; four were veterans of the Viet Nam conflict, and one had lost an eye there in a mine field. Medical personnel and women were excluded. The court martial lasted for nearly a month.

On June 2, 1967, Captain Levy was convicted. That night he was neither confined nor restricted, but the next day, after the imposition of a sentence of three years imprisonment, the Executive Officer grasped him, clapped handcuffs on him, and pushed and shoved him from the courtroom. His counsel were falsely advised as to his destination. They were halted by a cordon of military

[3] The circumstance that petitioner has been tried and convicted by a court martial since the date of filing of his complaint in the district court action herein does not, of course, moot his class-action claim for general injunctive and declaratory relief. Indeed, his prosecution, and its harrowing incidents, serves only to intensify the *in terrorem* effect of the statutory provisions he challenges.

police and by road blocks as they attempted to follow the automobile that carried him away. See *New York Times*, June 4, 1967, 1:3.

Since that day, Captain Levy has been confined to a room in the Army Hospital at Fort Jackson. He is not permitted to speak to enlisted men and, since there are no other officers held there, he is for practical purposes in solitary confinement. A labyrinth of bureaucratic procedures and regulations make it difficult for him to confer with his attorneys. See *New York Times*, June 5, 1967, 22:4.

Captain Levy has been denied bail pending military appeals. Requests for some form of release pending appeal were addressed to his commanding officer (twice), to the Secretary of the Army, to the United States District Court for the Eastern District of South Carolina, and to the United States Court of Military Appeals. The consensus of their dispositions of his applications is that bail pending appeal is not required in military cases, and that the decision whether to confine or release a military convict rests in the unfettered and unreviewable discretion of his commanding officer.

One of the principal stated bases of the exercise of that discretion by Captain Levy's commanding officer (as enumerated in his letter of June 12, denying Levy's second request for release) is instructive. The Commanding Officer, General E. B. Roberts, "considered, among other things, the impact upon morale and discipline of military personnel stationed at Fort Jackson and throughout the Armed Services of any removal of all restraint as suggested . . . ." In this usage, and as applied to Levy's charge and conviction for political expression, "morale

and discipline," is a beguiling euphemism for the "chilling effect" of which *Dombrowski* spoke.

Captain Levy's resort to judicial remedies in an attempt to secure his liberty during the extended period of military appeals (estimated at eighteen to twenty-four months), did have one significant consequence. It got him defamed. On June 26, General E. B. Roberts, swearing out an affidavit in opposition to Levy's applications for habeas corpus, produced a ground for restraining Levy pending appeal that had not been mentioned in the General's two earlier letters. Roberts averred that, on May 31, 1967 (when Levy was not in confinement) he had learned (perhaps indirectly) from a reliable confidential informant that the informant had learned in turn that Levy had expressed to an unidentified close associate, the following:

> "his intention upon conviction to seek bail, and, having been released thereon, to flee the United States to a communist country, seek political asylum therein, remain absent from the United States for a period of several years, during which time he would denounce the United States, and that after several years he would contact an American embassy in the communist country and request permission to return to the United States; and that he fully expected this request would be granted in view of the lenient treatment of defectors by the United States."

Captain Levy himself avers that this extraordinary tale is concocted from whole cloth. But he has so far been denied any forum in which he can challenge factually the truth of the Roberts affidavit.

The upshot of this proceeding is that the more than three million personnel currently serving on active duty in the armed forces of the United States are put on notice, *that*: if they express opinions and ideas unpopular with the military establishment and are prosecuted for conduct unbecoming an officer and a gentleman, or something vaguer under Article 134, the First Amendment *may* protect them in the end, *provided* they are willing to: face a trial before a military court, be slapped into handcuffs at its conclusion, suffer confinement under harsh conditions for a prolonged period, forego the possibility of release pending appeal; or, if they seek release or bail pending appeal, subject themselves to preposterous and abusive slander. This may be, indeed, an optimistic assessment. It must be remembered that Captain Levy is white, a professional man of middle-class background, highly articulate and literate, and an officer. Those members of the class which he represents who lack any of these attributes may not fare quite so well.

And, of course, there is no assurance that Captain Levy's First Amendment rights will be vindicated in the end. After he has been sufficiently abused and his appeals sufficiently protracted, the Army may unilaterally decide at any time to remit his unserved time, release him from confinement, discharge him, and thus remove his case from the timely and effective cognizance of any civilian court. See, e.g., *Miller* v. *United States*, 324 F. 2d 730 (10th Cir. 1963).

This is an exceedingly high price to pay for the expression of one's political views and opinions. The prospect of paying it is an exceedingly frightening prospect, and therefore, we suggest, a commensurately effective engine of repression mounted against three million American

citizens. But the vice does not stop there. Whatever distinctions may be imagined between *Dombrowski* and its military parallels, one insight of the *Dombrowski* opinion is indistinguishably applicable. "[F]ree expression [is] . . . of transcendent value to all society, and not merely to those exercising their rights." 380 U. S. at 486. To conceive the issue posed by this litigation as an exclusively military concern is, for this reason, half-sighted. Stifling Captain Levy and his compeers diminishes us all —army men, civilians, opponents of the war in Viet Nam, its supporters, and those who don't know yet but would like to listen and find out. This insight—that not alone the speaker, but the listener is deprived when speech is unconstitutionally deterred—seems to us an additional reason why, on the merits, the boundaries of *Dombrowski* cannot be drawn so as to exclude from its protection military *speakers*. In any event, due recognition of the interest of the listener in this litigation makes it the more imperative that review be granted and that this Court confront and resolve the *Dombrowski* issue now.

B. *The narrow reading of* Dombrowski *by the courts below conflicts with the liberal reading given that decision by the Court of Appeals for the Second Circuit.*

In *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (2d Cir. 1967), a distinguished panel of the Court of Appeals for the Second Circuit took the view that *Dombrowski* compelled the granting of an injunction against a Selective Service Board reclassification shown to be an impermissible act of retaliation for a registrant's participation in demonstrations protesting the war in Viet Nam. Speaking for himself and for Judges Friendly and Smith, Judge Medina acknowledged that:

"Irrespective of the existence of the power to do so, the courts, and particularly this Court, have been extremely reluctant to bring any phase of the operation of the Selective Service System under judicial scrutiny. The very nature of the Service demands that it operate with maximum efficiency, unimpeded by external interference. Only the most weighty consideration could induce us to depart from this long standing policy. But of all constitutional rights, the freedoms of speech and assembly are the most perishable, yet the most vital to the preservation of American democracy. Historically, these preferred and paramount rights have continually come under attack from the best intentioned sources. And once the erosion of these rights is permitted to begin, it is exceedingly difficult to halt and the intervening damage may be irreparable. Here it is the free expression of views on issues of critical current national importance that is jeopardized. On such topics perhaps more than any other, it is imperative that the public debate be full and that each segment of our society be permitted freely to express its views. Thus the allegations of the complaint in this case that the draft boards have unlawfully suppressed criticism must take precedence over the policy of non-intervention in the affairs of the Selective Service." 372 F. 2d at 822.

The court then addressed specifically, under the heads "subject matter jurisdiction," "justiciability," and "exhaustion of administrative remedies", each of the considerations (whether identically or merely similarly designated) thought by Judges Corcoran, Tamm and Leventhal to preclude judicial relief in petitioner Levy's case. As the Sec-

ond Circuit read *Dombrowski*, these objections crumbled under the weight of the judicial obligation to fashion efficient and, if need be, extraordinary remedies for the vindication of threatened First Amendment rights.

> "... Quite similarly to our case, the Supreme Court [in *Dombrowski*] allowed that the inconvenience which normally accompany a prosecution were insufficient to invoke federal court intervention and that the rights of the appellants could ultimately be vindicated through the normal procedures. Nevertheless, the Court reversed the District Court and held, first, that irreparable injury had been alleged and, second, that abstention was not appropriate. Regarding the first point, the Court said:
>
> > [T]he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." 372 F. 2d at 824.

Although the decision in *Wolff* and that rendered by the courts below are not technically inconsistent—the one involving federal judicial intrusion into the Selective Service process; the other, federal judicial intrusion into the administration of military penal law—the guiding spirit by which they are decided and the construction which each puts upon *Dombrowski* are irreconcilable. *Wolff* analogizes

the traditional hands-off attitude displayed by the federal courts with regard to Selective Service operations to the traditional hands-off attitude of federal courts as regards state criminal proceedings; and it accepts the *Dombrowski* limitation upon the latter as logically compelling a similar limitation of the former. Obviously, the hands-off attitude of the federal courts toward Selective Service is part and parcel of the general reluctance of those courts to become embroiled in military affairs, and responds to considerations identical to those thought controlling by the district and circuit courts below in petitioner Levy's case. The courts of the District of Columbia, however, declined to accept the Second Circuit's view that those considerations were subordinated by the logic of *Dombrowski* in First Amendment cases. While *Wolff* carries *Dombrowski* to the porches of the military establishment, the *Levy* courts (Judge Bazelon dissenting) firmly decline to recognize *Dombrowski's* presence on the military horizon. It is impossible to read the opinions in the respective cases without concluding that the Second Circuit has tuned in on *Dombrowski,* in this broad area of military administration, while the District of Columbia has brusquely dialed it out. This Court should grant *certiorari* here to disentangle *Dombrowski* from the toils of these discordant views.

C. *It is particularly appropriate to grant review in petitioner's case at the present time because of the pendency of other cases before the Court that raise broad questions of the scope and significance of the* Dombrowski *decision.*

This Court has heretofore noted probable jurisdiction of an appeal in *Zwickler* v. *Koota,* 261 F. Supp. 985

(E. D. N. Y. 1966), where a three-judge district court has all but overruled *Dombrowski*. O. T., 1967, No. 29. A jurisdictional statement has been filed in the second round of the *Cameron* v. *Johnson* litigation, but has not yet been acted upon by the Court. See *Cameron* v. *Johnson*, 381 U. S. 741 (1965); *Cameron* v. *Johnson*, 262 F. Supp. 873 (S. D. Miss. 1966); O. T., 1966, Misc. No. 1773. More recently, a jurisdictional statement was filed in a case coming from Wisconsin, *Zwicker* v. *Boll*, O. T., 1967, Misc. No. 573, in which a three-judge district court split three ways regarding the import of *Dombrowski*. It is apparent that this Term will see the Court faced with issues requiring fundamental consideration and development of the *Dombrowski* principle. Hearing of petitioner's case together with the others reviewed by the Court will broaden that consideration and development through the addition of the fresh perspective supplied by *Dombrowski's* confrontation with the military.

D. *In their rejection of* Dombrowski, *the courts below have given a broad reading to this Court's decision in* Gusik *v.* Schilder, Orloff *v.* Willoughby, *and* Beard *v.* Stahr, *which sets those decisions into conflict not merely with the rationale of* Dombrowski, *but also with the Court's holdings in* Toth *v.* Quarles *and* Reid *v.* Covert.

In his opinion declining to convene a three-judge court, District Judge Corcoran distills from such decisions as *Gusik* v. *Schilder*, 340 U. S. 128 (1950); *Orloff* v. *Willoughby*, 345 U. S. 83 (1953); and *Beard* v. *Stahr*, 370 U. S. 41 (1962), the broad principle that the federal civil courts have "no jurisdiction, by way of a three-judge court or otherwise, to interfere with the operation of the military." At the circuit level, Judge Tamm apparently agrees, and

would hold post-conviction habeas corpus—following exhaustion of military appeals—the exclusive mode of review of military criminal matters by the civilian courts. Judge Leventhal puts the issue as one of equity, but relies essentially upon the same line of authorities to support the finding of "a judicial tradition which for more than 150 years has resisted all efforts to issue mandates intended to obviate exposure to court martials or anticipate the results of proceedings before military tribunals."

These views grossly exaggerate the force of this Court's decisions restricting federal judicial intervention into military affairs. *Gusik* is nothing but a run-of-the-mill application of the exhaustion doctrine, familiar in the federal habeas corpus jurisprudence applicable alike to state and military prisoners. The case does not hold that civilian courts can never issue process to anticipate and stop military court-martial proceedings, but only that it is ordinarily inappropriate to do so when military remedies appear adequate. Where the Court has thought it necessary, in extraordinary situations, to intrude the judicial power of the United States into unconcluded court-martial proceedings, it has done so, *Toth* v. *Quarles*, 350 U. S. 11 (1955); *Reid* v. *Covert*, 354 U. S. 1 (1957)—just as it has intruded that power into unconcluded state criminal proceedings in extraordinary situations where state remedies were inadequate. E.g., *In re Neagle*, 135 U. S. 1 (1890). The decision in *Dombrowski* defines just such an extraordinary situation, of course. But the courts below will brook no exceptions; they insist on finding in the old books (quite wrongly, we submit) an inflexible and categorical principle of general application that perceives the "military establishment as an enclave beyond the reach of the civilian courts." War-

ren, *supra*, 37 N. Y. U. L. Rev. at 188. Particularly at this point in history, we submit, the Court should be quick to revise and repudiate any such conception—going as it does far beyond anything decided by the Court even in earlier and more authoritarian eras.

Surely the line of decisions other than *Gusik* relied upon below—*Orloff; Beard; Reaves* v. *Ainsworth*, 219 U. S. 296 (1910), and like decisions—establish no such principle. All of those cases involved attempts to embroil the federal courts in the routine administrative processes of the military services. None involved military criminal prosecutions, and particularly none involved military prosecutions that threatened to affect First Amendment freedoms. Even in the armed forces, a criminal prosecution is not a mere routine, quotidian detail, a matter of internal housekeeping. It is a unique and drastic procedure, having all of the purposes and effects of a civilian criminal proceeding—deterrence, punishment, and what is mildly called "incapacitation." Procedures so grave as this are not committed to the military establishment, under our Constitution, unfettered by the basic safeguards of the Bill of Rights, or unencumbered by the precious inconvenience of civilian judicial scrutiny, necessary to make those basic safeguards work. Ordinarily, of course, the civilian judicial scrutiny of military criminal administration is adequate if it comes at the termination of a military prosecution; and ordinarily—as in state criminal matters—it is properly reserved until that time. But where vague and overbroad criminal liability threatens First Amendment freedoms with a pall of repression, *Dombrowski* establishes that "[t]he assumption that defense of a criminal prosecution [and post-conviction federal judicial review] will generally assure ample vin-

dication of constitutional rights is unfounded." 380 U. S. 486. Petitioner Levy's case graphically demonstrates how unfounded is that assumption in the military. We submit that the *Dombrowski* consequence properly follows from the demonstration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES MORGAN, JR.
LAUGHLIN MCDONALD
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

MELVIN L. WULF
ALAN H. LEVINE
ELEANOR HOLMES NORTON
156 Fifth Avenue
New York, New York 10010

LAWRENCE SPEISER
RALPH J. TEMPLE
1424 16th Street, N.W.
Washington, D. C. 20036

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa. 19104

Attorneys for Petitioner

September 5, 1967

APPENDIX

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 953-67

CAPTAIN HOWARD BRETT LEVY, *et al.*,

Plaintiff,

—v.—

ROBERT S. MCNAMARA, *et al.*,

Defendants.

Opinion and Order

Captain Howard Brett Levy, plaintiff, is a Commissioned Officer in the United States Army. He brings this action on behalf of himself and others similarly situated under Rule 23 of the Federal Rules of Civil Procedure. He requests the convocation of a three-judge court (28 U.S.C. § 2282) from which might issue a preliminary injunction to restrain the defendants from proceeding with a general court-martial scheduled to commence against him on May 10, 1967.

Argument on the issues presented was heard on April 28, 1967.

Captain Levy is charged with violation of Articles 133, 134 and 90 of the Uniform Code of Military Justice (hereinafter called "U.C.M.J."). He challenges the constitutionality of Articles 133 and 134 on grounds of vagueness in violation of the Fifth Amendment. He further asserts that Articles 133 and 134 are being utilized to prosecute or

threaten to prosecute him for exercise of rights of free expression guaranteed by the First Amendment of the Constitution. As to the charge under Article 90 of the U.C.M.J., although it deals with refusal to obey lawful orders, it too is challenged in the context of this case on grounds that it will deprive the plaintiff of his right of free expression and association under the First Amendment.

Captain Levy was a medical doctor in civilian life. He was commissioned as an officer in the United States Army Reserves on January 29, 1962 and was assigned to the Medical Corps. He was permitted to defer his active service in order to complete his resident training as a dermatologist and entered active military service on July 9, 1965. His initial and present assignment is Chief of Dermatology at the United States Army Hospital, Fort Jackson, South Carolina, where at times pertinent hereto the United States Army conducted a medical training program for Special Forces Aidmen. On or about October 11, 1966 the plaintiff Levy was directed to establish and operate a particular phase of that training program. He refused to obey that order and his refusal is the basis of the charge against him under Article 90 of the U.C.M.J. (10 U.S.C. § 890).

A second charge alleges that Captain Levy uttered disloyal statements to divers enlisted personnel at Fort Jackson with the design to promote disloyalty and disaffection among the troops. This charge was brought under Article 134 of the U.C.M.J. (10 U.S.C. § 934).

The foregoing charges were preferred against the plaintiff on December 23, 1966 by Captain Levy's Commanding Officer, Colonel Henry F. Fancy. The charges were forwarded to the Commanding General of the United States Training Center, Fort Jackson, South Carolina, with a

recommendation of trial by general court-martial. Thereafter various investigations and preliminary procedures were carried out under Article 32 of the U.C.M.J. (10 U.S.C. § 832). As a result of this investigation three additional charges were brought against Captain Levy. Substantially these three additional charges relate to disloyal and disrespectful statements allegedly made by Captain Levy to various enlisted personnel based upon his views as to the conduct of the war in Vietnam. Two such charges were brought under Article 133 of the U.C.M.J. (10 U.S.C. § 933) ("conduct unbecoming an officer and gentleman") and the third was based on Article 134, supra, a general article covering all disorders and conduct deemed prejudicial to the Armed Forces. The particular statutes relevant to these proceedings and charged as being unconstitutional are attached as Appendix A.

On March 3, 1967 the Commanding General of the United States Army Training Center, Fort Jackson, South Carolina issued an order convening the court-martial on the several charges levied against Captain Levy. This court-martial is scheduled to begin May 10, 1967.

The defendants oppose both the motion for a preliminary injunction and convening of a three-judge court as sought by the plaintiff. They assert *inter alia* that a three-judge court is clearly unwarranted since this Court lacks jurisdiction over the subject matter of the action and no substantial constitutional issue is presented.

The initial question before the Court is whether it has jurisdiction of the subject matter.

The Congress has taken great care to define the rights of those subject to military law and to provide a complete system of appellate review within the military system to secure those rights. Within this framework, however, it is

acknowledged that courts-martial are not designed to provide the same protection of the rights of the individual as is provided in the civilian courts. Out of necessity, as Congress has recognized, " . . . [T]he military system must emphasize the iron hand of discipline more than it does the even scales of justice." *Reid* v. *Covert,* 354 U.S. 1 (1957).

Historically, Federal courts recognizing the doctrine of separation of powers and exhaustion of remedies doctrines, have treated petitions for injunctions of court-martial proceedings as exceeding the Court's jurisdiction. It has been the reiterated policy that "[T]he courts cannot command or regulate the Army." *Reaves* v. *Ainsworth,* 219 U.S. 296, 306 (1910). As stated in *Burns* v. *Wilson,* 346 U.S. 137 at 140 (1953):

> "Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress."

This policy has been emphasized by the Supreme Court in *Orloff* v. *Willoughby,* 345 U.S. 83 at 93 (1953), a case involving a habeas corpus petition by an Army doctor. Therein the Court declared:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justifica-

> tion, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

Recently, our Court of Appeals in *Luftig* v. *McNamara, et al.*, C.A.D.C. No. 20,129, Feb. 6, 1967, applied the principles cited above. There a lawfully inducted private in the U. S. Army sought to enjoin the Secretary of Defense from sending him to Vietnam. The Court stated:

> "It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing . . . the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive."

It is significant that the plaintiff has not shown any instance of the issuance of an injunction to interfere and prevent the conduct of a court-martial proceeding.

Plaintiff will have ample opportunity to raise his contentions in the manner provided by the U.C.M.J. The fact that the court-martial has neither considered nor had the opportunity to consider the plaintiff's claim precludes the

Court from acting to circumvent established procedures. *Wales* v. *Whitney*, 114 U.S. 564 (1885); *Gusik* v. *Schilder*, 340 U.S. 128 (1950); *Beard* v. *Stahr*, 370 U.S. 41 (1962). The exhaustion of remedies doctrine applied to Military tribunals is analogous to that applicable to State court proceedings. In *Gusik* v. *Schilder*, 340 U.S. 128 (1950) the Court said at page 131:

> "If Article 53 had been in force when the habeas corpus proceedings were instituted, the District Court would not have been justified in entertaining the petition unless the remedy afforded by the Article had first been exhausted. An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. This is not only the holding of the Court in a long line of cases [citing cases]; it is the rule which Congress recently wrote into the Judicial Code. 28 U.S.C. § 2254, 28 U.S.C.A. § 2254."

While these cases do not deal specifically with application for convening a three-judge court, the principles enunciated do speak loudly for the proposition that this Court has no jurisdiction, by way of a three-judge court or otherwise, to interfere with the operation of the military.

The plaintiff seeks to avoid the force of these precedents by relying on *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) and as applied by our own Court of Appeals in *Reed Enterprises* v. *Corcoran*, 354 F.2d 519 (D.C. Cir. 1965). These decisions have no force on the subject matter before

the Court in the instant case. In both *Dombrowski* and *Reed* there was never any question that the Court possessed jurisdiction over the subject matter of the actions. There the sole question was whether the case presented a substantial constitutional question, whether injunctive relief was necessary, and whether there was a case or controversy.

This opinion constitutes the findings of fact and conclusions of law of the Court.

In the light of such findings and conclusions, it is this 3rd day of May, 1967,

ORDERED that the petition for a preliminary injunction and convening of a three-judge court is denied.

H. F. CORCORAN
Judge

Appendix A Attached to Opinion and Order

Statutes Involved

Article 90, U.C.M.J., 10 U.S.C. 890, provides:

§ 890. Art. 90. Assaulting or willfully disobeying superior commissioned officer.

Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct. . . .

Article 133, U.C.M.J., 10 U.S.C. 933, provides:

§ 933. Art. 133. Conduct unbecoming an officer and a gentleman.

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct. . . .

Article 134, U.C.M.J., 10 U.S.C. 934, provides:

§ 934. Art. 134. General article.

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court. . . .

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,972—September Term, 1966

Civil 953-67

CAPTAIN HOWARD BRETT LEVY, for himself and for all others similarly situated,

Petitioner,

v.

HONORABLE HOWARD F. CORCORAN, United States District Judge,

Respondent.

Before:

BAZELON, *Chief Judge;* and
TAMM and LEVENTHAL, *Circuit Judges.*

Order

This cause came on for hearing on petitioner's petition for writ of mandamus and application for a stay and said petition and application were argued by counsel.

Upon consideration whereof, it is

ORDERED by the court that petitioner's aforesaid petition for writ of mandamus and application for a stay are denied.

Per Curiam.

Chief Judge Bazelon dissents from the foregoing order for the reasons stated in his dissenting opinion filed herewith.

TAMM, *Circuit Judge.* I join in denying the application for the stay and the petition for writ of mandamus. I am of the view that this case is not properly before this court at the present time. I am of the opinion that the record discloses that our present petitioner has an adequate remedy at law. It is my view that he cannot at this time show imminent, irreparable injury. In the event of his conviction by a court martial, which at this time is problematical, there is then available to him, through court martial proceedings, review of those proceedings as specifically provided by law, including an ultimate appeal to the United States Court of Military Appeals, which is in itself a court entirely composed of civilians and which court within the last week has ruled that the principles of the Supreme Court's holding in the *Miranda* case are applicable to court martial proceedings. *United States* v. *Tempia,* 35 L. W. 2625 (April 25, 1967).

In addition, there is available to this petitioner, in due course and if he is convicted, the right of appeal to the civil courts through habeas corpus or other appropriate proceedings.

Against this background, I feel that at this time this court is without any jurisdiction in this matter.

LEVENTHAL, *Circuit Judge*: The refusal of the District Judge to take steps to convene a three-judge court seems to me sound for want of equity jurisdiction to restrain de-

fendants from proceeding with a general court-martial schedule to commence May 10, 1967.

The lack of equity jurisdiction to issue an injunction seems to me to inhere in the relationship of the civil courts and military tribunals, a relationship which looks to habeas corpus or kindred remedies as the technique by which the civil courts exercise such limited intervention as may be proper in cases taken before military tribunals. There may be want of equity jurisdiction for such reasons of governmental relationships even where there is no truly adequate remedy at law.[1] But the conclusion is strengthened by our awareness that petitioner can preserve his constitutional defenses before the general court-martial, and in due course can present them to the Court of Military Appeals. That court has indicated its readiness to apply to men in the military service the protection of pertinent Supreme Court decisions based on constitutional grounds.[2]

These considerations do not wholly answer petitioner's contention that the ability of the military to use the broad provisions of articles 133 and 134 of the Uniform Code of Military Justice (10 U.S.C. §§ 933, 934) to punish expressions of views within the continental United States forebodes such a "chilling effect" on speech that is protected by the Constitution as to call for the application of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

The argument is not without logic. Where it breaks down, it seems to me, is where it runs into a judicial tradition which for more than 150 years has resisted all efforts to issue mandates intended to obviate exposure to court-

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[1] *Smith* v. *Katzenbach*, 122 U. S. App. D. C. 113, 351 F. 2d 810 (1965).

[2] *United States* v. *Tempia*, April 25, 1967.

martials or anticipate the results of proceedings before military tribunals.[3]

It is not necessary to consider now whether this pattern of decisions is absolutely inviolate. It is formidable enough to obviate injunctive relief based on an expansion of the implications of *Dombrowski*. Notwithstanding the language of *Dombrowski*, some individuals and groups will be denied injunctions and relegated to protecting their First Amendment freedoms by way of defense in other proceedings.[4] Furthermore, I cannot accept petitioner's argument that a court should be as ready to enjoin the proceeding of a military tribunal as a Federal court to enjoin a state court proceeding.

Freedoms of speech and expression stand on the highest constitutional ground. And the fact of war does not obliterate freedom to dissent from the war. It may be assumed at least for discussion that although the balance between freedom and discipline is different for men in the military service than for civilians, at least some part of these freedoms is retained when civilians enter the military service. It may further be assumed that if these freedoms are unlawfully disregarded by military tribunals, there may in due course be recourse to the civil courts. But that does not compel this recourse to be by way of injunctive relief.

Whether the foregoing decision was reserved by Congress for three judges, rather than one, is not an easy question. It suffices to say that when the district judge is presented with a motion that is insubstantial insofar as it requests injunctive relief, the law does not contemplate a

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[3] *Wales* v. *Whitney*, 114 U. S. 564 (1885); *Gusik* v. *Schiller*, 340 U. S. 128 (1950); *Beard* v. *Stahr*, 370 U. S. 41 (1962); *Gorko* v. *Commanding Officer*, 314 F. 2d 858 (10th Cir. 1963).

[4] *W. E. B. DuBois Clubs* v. *Katzenbach*, Civil Action 1087-66, April 18, 1967 (Dist. Ct. Dist. of Col., 3-judge).

three-judge court. The district judge can preclude a three-judge court only when it is clear that injunctive relief is not available. I think this is such a case.

BAZELON, *Chief Judge*, dissenting: Petitioner filed his papers at 5:00 p.m. yesterday evening. The Government filed its response at 11:00 a.m. today, and we heard this case at 11:45 a.m. Consequently, there has not been sufficient time for the consideration which the case deserves. However, as presently advised, I am compelled to dissent from the order issued today.

On September 10, 1965, Captain Howard Brett Levy wrote a letter to Sergeant Geoffrey Hancock, Jr. who was then stationed in Viet Nam. The letter strongly, and perhaps intemperately, criticized the foreign policy of the United States. Between February and December, 1966, Captain Levy made similar criticisms to various military personnel at his hospital base in South Carolina. On the basis of these two incidents, Levy's commanding officer charged him with violating Article 133 ("conduct unbecoming an officer and a gentleman") and Article 134 ("all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, . . . ") of the Uniform Code of Military Justice. 10 U.S.C. §§ 933, 934 (1964). Levy was also charged with a violation of Article 90 (wilfully disobeying "a lawful command of his superior commissioned officer").[1]

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[1] Apparently Levy would not give Special Forces Aidmen instruction in dermatology because the instruction would have involved exposing the private parts of his female patients who were suffering from venereal diseases. Levy thought this exposure, without the consent of the patients, violated professional ethics.

10 U.S.C. § 890 (1964). The court martial, at which Levy faces the possibility of a life sentence, begins tomorrow.

Levy claims that Articles 133 and 134 are unconstitutionally vague and that Article 90 is unconstitutional as applied to him. On April 17, 1967, he moved in our District Court to have a three-judge District Court convened to decide the question and to issue an injunction against his pending court martial. On May 3, the District Court denied the motion.

Under *Idlewild Bon Voyage Liquor Corporation* v. *Epstein,* 370 U.S. 713 (1962), a three-judge District Court must hear and determine the case when (1) "the constitutional question raised is substantial" and (2) "the complaint at least formally alleges a basis for equitable relief." 370 U.S. at 715.

Recent cases in this Circuit have interpreted the first requirement to mean that the constitutional claim must be "patently frivolous" before one judge can dispose of it. *Reed Enterprises* v. *Corcoran,* 122 U.S. App. D.C. 387, 390, 354 F.2d 519, 522 (1965); *Hobson* v. *Hansen,* 252 F.Supp. 4, 7 (D.D.C. 1966). Levy argues that Articles 133 and 134 are overly broad, and that their breadth impermissibly impinges upon First Amendment freedoms. A simple reading of the Articles shows that they are quite broad. Indeed, the Manual for Courts-Martial interprets Article 134 to include more than fifty different offenses ranging from abusing public animals to wearing an unauthorized insignia.[2] Levy argues also that Article 90, though not un-

[2] One of the evils of an overly broad statute is that it leaves the definition, and therefore the creation, of crimes to the discretion of minor executive or military officials. The attached appendix (the Manual's suggested forms for drafting charges and specifications under Article 134) shows exactly how broad the discretion is. And the suggested forms do not purport to be exclusive.

constitutional on its face, is being applied as part of a scheme to punish him for exercising his First Amendment rights in the past and prevent him from exercising them in the future.[3] For our present purposes we must take these allegations as true. And if they are true, the constitutionality of Article 90, as applied to Levy, is questionable. *Dombrowski* v. *Pfister*, 380 U.S. 479, 490 (1965).

The second requirement for convening a three-judge court is that the complaint allege a basis for equitable relief. Here Levy says that First Amendment rights will be "chilled" if his prosecution proceeds on the basis of two statutes which are unconstitutional on their face and one which is being applied in order to harass people who exercise their First Amendment rights.[4] This chilling effect, Levy claims, constitutes irreparable injury under *Dombrowski* v. *Pfister*, supra. If Article 90, though constitutional on its face, is being applied to harass Levy, then that part of his case fits within the first ground for the *Dombrowski* decision. 380 U.S. at 490. And if Articles 133 and 134 are unconstitutionally broad then that part of Levy's case fits within the second ground for the *Dombrowski* decision. 390 U.S. at 490-491.

Of course all of this assumes that *Dombrowski* would be read to allow interference with military courts. The *Dombrowski* opinion itself suggests no reason why it should not be read in this way, though there may be other rea-

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[3] He alleges, among other things, that at first his commanding officer decided upon a minor form of non-judicial discipline and that only after he learned of Levy's political opinion was the court martial decided upon.

[4] The problem concerns not only Levy's First Amendment rights but also the First Amendment rights of others, both military personnel and civilians, who may view Levy's court martial as governmental dissatisfaction with dissent.

sons why its scope would be limited. In any event, the applicability of *Dombrowski* to our case has never been decided and is not a frivolous issue.[5]

Since neither the constitutional attack on the Articles nor the claim of irreparable injury is frivolous, this case should be heard and determined by a three-judge District Court. I think this much is abundantly clear. If Levy does have a right to have his case heard and determined by a three-judge District Court, then I think it is equally clear that the right must be made meaningful by a short stay of the court martial proceedings. Otherwise, with the beginning of the court martial tomorrow morning, the three-judge District Court would be left with a moot case.

These questions, whether the statutes are unconstitutional, whether there is irreparable injury, whether *Dombrowski* applies to military courts, are not easy, and they are not made any easier by the extreme time-pressure which confronts us. Moreover, they are not questions for us. They are for a three-judge District Court. I do not intimate any view on the merits. I would grant a short stay simply to preserve the jurisdiction of the three-judge District Court. Once that court is convened it can decide whether to issue a temporary restraining order or a temporary injunction while it considers the merits. Our responsibility is simply to preserve jurisdiction for the court Congress intended to hear this case.

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[5] The cases cited in Footnote 3 of Judge Leventhal's opinion do not deal with statutes which impinge upon First Amendment rights.

APPENDIX ATTACHED TO ORDER

ARTICLE 134

Abusing public animal

118. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully (kick a public horse in the belly) (.....).

Adultery

119. In that ..... (, a married man,) did, (at) (on board) ....., on or about ..... 19...., wrongfully have sexual intercourse with ....., (a married woman) (a woman) not his wife.

Assault:

—Indecent

120. In that ..... did, (at) (on board) ....., on or about ..... 19...., commit an indecent assault upon ..... by ....., with intent to gratify his (lust) (sexual desires).

—Upon a commissioned officer

121. In that ..... did, (at) (on board) ....., on or about ..... 19...., assault ....., a commissioned officer of [the Army of the United States] [....., a friendly foreign power] [the United States (Navy) (Marine Corps) (Air Force) (Coast Guard)], by .....

NOTE.—That the accused did not know the commissioned officer to be such is a defense to this kind of assault—but not to an included assault in which the official position of the victim is immaterial.

—Upon a warrant, non-commissioned, or petty officer

122. In that ..... did, (at) (on board) ....., on or about ..... 19...., assault ....., a (warrant) (noncommissioned) (petty) officer of [the Army of the United States] [the United States (Navy) (Marine Corps) (Air Force) (Coast Guard)], by .....

NOTE.—That the accused did not know the warrant, etc., officer to be such is a defense to this kind of assault—but not to an included assault in which the official position of the victim is immaterial.

—Upon a person in the execution of police duties

123. In that ..... did, (at) (on board) ....., on or about ..... 19...., assault ....., a person then having and in the execution of (air police) (military police) (shore patrol) (civil law enforcement) duties, by .....

—With intent to commit certain offenses

124. In that ..... did, (at) (on board) ....., on or about ..... 19...., with intent to commit (murder) (voluntary manslaughter) (rape) (robbery) (sodomy) (arson) (burglary) (housebreaking), commit an assault upon ..... by .....

Assault (consummated by a battery) upon a child under the age of 16

125. In that ..... did, (at) (on board) ....., on or about ..... 19...., unlawfully (strike) (.....) ....., a child under the age of sixteen years, (in) (on) the ..... with .....

Bigamy

126. In that ..... did, at ....., on or about ..... 19...., wrongfully and bigamously marry ...., having at the time of his said marriage to .... a lawful wife then living, to wit: .....

Bribery and graft:

—Asking, etc.

127. In that ....., being at the time (a contracting officer for .....) (the personnel officer of ....) (.....), did, (at) (on board) ....., on or about ..... 19...., wrongfully and unlawfully (ask) (accept) (receive) from ....., (a contracting company engaged in .....) (.....), (the sum of $.....) (....., of a value of about $..... .....) (.....), [with intent to have his (decision) (action) influenced with respect to] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by him the said ..... in relation to] an official matter in which the United States was and is interested, to wit: (the purchasing of military supplies from .....) (the transfer of ..... to duty with .....) (.....).

—Promising, etc.

128. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and unlawfully (promise) (offer) (give) to ....., (his commanding officer) (the claims officer of .....) (.....), (the sum of $.....) (....., of a value of about $.....) (.....), [with intent to influence the (decision) (action) of the said ..... with respect

to] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by the said ..... in relation to] an official matter in which the United States was and is interested, to wit: (the granting of leave to .....) (the processing of a claim against the United States in favor of .....) (.....).

Check, worthless, making and uttering

129. In that ..... did, (at) (on board) ....., on or about ..... 19...., [with intent to deceive, wrongfully and unlawfully] make and utter to ..... a certain check, in words and figures as follows, to wit: ....., (in payment of a debt in the amount of $.....) (for .....) [, he, the said ....., then not intending to have sufficient funds in the ..... bank available to meet payment of said check upon its presentment for payment in due course], and did thereafter wrongfully and dishonorably fail to (place) (maintain) sufficient funds in (the .....) (said) bank for payment of such check upon its presentment for payment.

NOTE.—Both allegations inclosed in brackets should be used in a case in which the accused had given the check in purported payment of a debt not intended to have sufficient funds in the bank available to meet payment upon presentment in due course, but had not thereby obtained any money, personal property, or article of value. Obtaining money, personal property, or an article of value by means of giving a check, without intending to have sufficient funds in the bank available to meet payment upon presentment in due course, may be charged as larceny or wrongful appropriation, as the case may be, in violation of Article 121 (see 200). Without the material in brackets, this specification may be used to denounce merely a wrongful and dishonorable failure to place or maintain sufficient funds in the bank for payment of the check.

Debt, failing to pay

130. In that ....., being indebted to ..... in the sum of $..... for ....., which amount be-

came due and payable (on) (about) (on or about) ...., did, (at) (on board) ....., from ..... 19.... to ..... 19...., wrongfully and dishonorably fail to pay said debt.

Disloyal statements

131. In that ....., did, (at) (on board) ....., on or about ..... 19...., with design to [promote (disloyalty) (disaffection) (disloyalty and disaffection) among (the troops) (the civilian populace) (the troops and the civilian populace)] [.....], publicly utter the following statement, to wit: "....."", or words to that effect, which statement was disloyal to the United States.

Disorderly, drunkenness, etc.:

—In command, quarters, etc., or under service discrediting circumstances

132. In that ..... was, (at) (on board) ....., on or about ..... 19...., (drunk) (disorderly) (drunk and disorderly) [in (command) (quarters) (station) (camp) (.....)] [on board ship] [in uniform in a public place, to wit: .....] [.....].

—Drinking liquor with prisoner

133. In that ....., a (sentinel) (.....) in charge of prisoners, did, (at) (on board) ....., on or about ..... 19...., unlawfully drink intoxicating liquor with ....., a prisoner under his charge.

—Drunk, prisoner found

134. In that ....., a prisoner, was, (at) (on board) ....., on or about ..... 19...., found drunk.

—Incapacitating oneself for performance of duties through prior indulgence in intoxicating liquors

135. In that ..... was, (at) (on board) ....., on or about ..... 19...., as a result of previous indulgence in intoxicating liquor, incapacitated for the proper performance of his duties.

Drugs, habit forming, or marihuana:

—Wrongful possession

136. In that ..... did; (at) (on board) ....., on or about ..... 19...., wrongfully have in his possession ..... ounces, more or less, of (a habit forming narcotic drug, to wit: .....) (marihuana).

—Wrongful use

137. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully use (a habit forming narcotic drug, to wit: .....) (marihuana).

False or unauthorized pass, making, etc.

138. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully [and falsely (make) (forge) (alter by .....) (counterfeit) (tamper with by .....)] [sell to .....] [give to .....] [(use) (have in his possession) with intent to (defraud) (deceive)] (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (.....) in words and figures as follows: ....., [he, the said ....., then well knowing the same to be (false) (unauthorized) (.....)].

False swearing

139. In that ..... did, (at) (on board) ....., on or about ..... 19...., (in an affidavit) (in his testimony before a ..... court-martial at the trial of .....) (in .....) wrongfully and unlawfully (make) (subscribe) under lawful (oath) (affirmation) a statement in substance as follows: ....., which statement he did not then believe to be true.

Firearm, discharging:

—Through carelessness

140. In that ..... did, (at) (on board) ....., on or about ..... 19...., through carelessness, discharge a (service rifle) (.....) in the (squadroom) (tent) (barracks) (..... compartment) (.....) of .....

—Willfully, under such circumstances as to endanger life

141. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and willfully discharge a firearm, to wit: ....., (in the mess hall of .....) (.....), under circumstances such as to endanger human life.

Fleeing scene of accident

142. In that ....., being (the driver of) (a passenger in) (the senior officer in) a vehicle at the time of (an accident) (a collision), did, at ....., on or about ..... 19...., wrongfully and unlawfully leave the scene of the (accident) (collision) without [rendering assistance to ..... who had been struck (and injured) by the said vehicle] [making his identity known].

Gambling with subordinate

143. In that (Sergeant) (.....) ..... (, boatswain's mate, first class, U. S. Navy,) (, ...), did, (at) (on board) ....., on or about ..... 19...., gamble with (Private) (.....) ..... (, seaman apprentice, U. S. Navy) (, ...).

Homicide, negligent

144. In that ..... did, (at) (on board) ....., on or about ..... 19...., unlawfully kill ....., [by negligently ..... the said ..... (in) (on) the ..... with a .....] [by driving a (motor vehicle) (.....) against the said ..... in a negligent manner] [.....].

Impersonating an officer, etc.

145. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and unlawfully impersonate an [(officer) (warrant officer) (noncommissioned officer) (petty officer) (agent or superior authority) of the (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)] [an official of the Government of .....] by [publicly wearing the uniform and insignia of rank of a (lieutenant of the .....) (.....)] [showing the credentials of .....] [.....] (with intent to defraud ..... by .....).

Indecent acts with a child

146. In that ..... did, (at) (on board) ....., on or about ..... 19...., [take (immoral) (improper) (indecent) liberties with] [commit a (lewd) (lascivious) act (upon) (with) the body of] ....., a (female) (male)

under sixteen years of age, by [fondling (her) (him) and placing his hands upon (her) (his) leg and private parts] [.....], with intent to (arouse) (appeal to) (gratify) the (lust) (passions) (sexual desires) of the said .... and .....).

Indecent exposure

147. In that ..... did, (at) (on board) ....., on or about ..... 19...., while (at a barracks window) (.....) willfully and wrongfully expose in an indecent manner to public view his .....

Indecent, insulting, or obscene language communicated by a male to a female

148. In that ..... did, (at) (on board) ....., on or about ..... 19...., (orally) (in writing) communicate to ....., a female, certain (indecent) (insulting) (obscene) language, to wit: .....

Indecent, lewd acts with another

149. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully commit an indecent, lewd, and lascivious act with ..... by ....

Loaning money at usurious rate

150. In that ..... (, for and in behalf of one ....,) did, (at) (on board) ....., on or about ..... 19...., loan to ..... $....., under an agreement whereby he, the said ....., was to receive for the use of said money for ..... (months) (days) [interest at the rate of ..... per cent per

(annum) (month)] [the sum of $ .....], thereby (demanding) (receiving) (demanding and receiving) an usurious and unconscionable rate of interest for said loan.

Mail, taking, opening, etc.

151. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and unlawfully take (a) certain [letter(s)] [postal card(s)] [package(s)], addressed to ....., [out of the (..... Post Office .....) (orderly room of .....) (unit mail box of .....) (.....)] [from .....] before (it) (they) (was) (were) (delivered) (actually received) (to) (by) the person(s) to whom (it) (they) (was) (were) directed, with design to [obstruct the correspondence] [pry into the (business) (secrets)] of .....

152. In that ..... did, (at) (on board) ....., on or about ..... 19...., [wrongfully and unlawfully (open) (secrete) (destroy)] [steal] (a) certain [letter(s)] [postal card(s)] [package(s)], addressed to ....., which said [letter(s)] [.....] [(was) (were) then [in the (..... Post Office .....) (orderly room of .....) (unit mail box of .....) (custody of .....) (.....)] [on the (bunk of .....) (.....)]] [had previously been committed to ...., (a representative of .....,) an official agency for the transmission of communications,] before said [letter(s)] [.....] (was) (were) (delivered) (actually received) (to) (by) the person(s) to whom (it) (they) (was) (were) directed.

Mails, depositing, etc., obscene matter in

153. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and knowingly

(deposit) (cause to be deposited) in the (United States) (.....) mails, for mailing and delivery to ....., a (letter) (picture) (.....) (containing) (portraying) (suggesting) (.....) certain obscene, lewd, and lascivous matter, to wit: .....

Misprision of felony

154. In that ....., having knowledge that ..... had actually committed a felony (at) (on board) ....., on or about ..... 19...., to wit: (the murder of .....) (.....), did, from about ..... 19.... to about ..... 19...., wrongfully and unlawfully conceal such felony and fail to make the same known to the civil or military authorities.

Nuisance, committing

155. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully (urinate) (defecate) (.....) [on the floor of the squadroom] [on the (deck) (bulkhead) of .....] [.....].

Pandering

156. in that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and unlawfully [(compel) (induce) (entice) (procure)] [attempt to (compel) (induce) (entice) (procure)] ..... to engage in (acts of prostitution) (sexual intercourse for hire and reward) with persons to be directed to (him) (her) by the said .....

157. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and unlawfully [receive valuable consideration, to wit: ....., on

account of arranging for] [arrange for] (.....) (unnamed persons) to engage in (sexual intercourse) (sodomy) with ....., (a prostitute) (.....).

Parole, violation of

158. In that ....., a prisoner on parole, did, (at) (on board) ....., on or about ..... 19...., violate the conditions of his parole by .....

Perjury, statutory

159. In that ....., having taken a lawful oath [in a proceeding before (a board of officers) (a court of inquiry) concerning .....] [upon the making of an affidavit as to .....] [.....], a case in which a law of the United States authorized an oath to be administered, that [he, the said ....., would (testify) (declare) (depose) (certify) truly] [a written (declaration) (deposition) (certificate) subscribed by him was true], did, (at) (on board) ....., on or about ..... 19...., willfully and contrary to such oath (state) (subscribe) a material matter, to wit: ....., which matter he did not then believe to be true.

NOTE.—If the matter falsely stated or subscribed under lawful oath is not material, the offense should be charged as false swearing.

Perjury, subornation of

160. In that ..... did, (at) (on board) ....., on or about ..... 19...., procure ..... to commit perjury by inducing him, the said ....., to take a lawful (oath) (affirmation) in a (trial by ..... court-martial of .....) (trial by a court of competent jurisdiction, to wit: ....., of .....) (deposition for use in a trial by ..... of .....) (.....

.....) that he, the said ....., would (testify) (depose) (.....) truly, and to (testify) (depose) (.....) willfully, corruptly, and contrary to such (oath) (affirmation) in substance that ....., which (testimony) (deposition) (.....) was upon a material matter and which the said ..... and the said ..... did not then believe to be true.

Prisoner, allowing to do unauthorized act

161. In that ....., (a sentinel) (overseer) (.....) in charge of prisoners, did, (at) (on board) ....., on or about ..... 19...., wrongfully allow ....., a prisoner under his charge, to [(go to) (enter) (go to and enter) an unauthorized place, to wit: .....] [(hold unauthorized conversation with .....) (loiter) (neglect his task by .....) (obtain intoxicating liquor) (.....)].

Public record, concealing, mutilating, etc.

162. In that ..... did, (at) (on board) ....., on or about ..... 19...., willfully and unlawfully [(conceal) (remove) (mutilate) (obliterate) (destroy)] [appropriate with intent to (conceal) (remove) (mutilate) (obliterate) (destroy)] a public record, to wit: [the (descriptive list) (rough deck log) (quartermaster's note book) of .....] [.....].

Quarantine, medical, breaking

163. In that ....., having been duly placed in medical quarantine (in the isolation ward, ... Hospital) (.....), did (at) (on board) ....., on or about ..... 19...., break said medical quarantine.

Refusing, wrongfully, to testify

164. In that ....., being in the presence of a [(general) (special) court-martial] [duly appointed board of officers] [.....] of the United States, of which ..... was (law officer) (president) (.....), (and having been directed by the said ..... to qualify as a witness) (and having qualified as a witness and having been directed by the said ..... to answer the following quuestions put to him as a witness, "....."), did, (at) (on board) ....., on or about ..... 19...., wrongfully refuse (to qualify as a witness) (to answer said questions).

Restriction, breaking

165. In that ....., having been duly restricted to the limits of ....., did, (at) (on board) ....., on or about ..... 19...., break said restriction.

Sentinel, lookout, offenses against and by

166. In that ..... did, (at) (on board) ....., on or about ..... 19...., [(attempt) (threaten) to] (unlawfully strike) (assault) ....., a (sentinel) (lookout) in the execution of his duty, [(in) (on) the .....] with (a) (his) .....

167. In that ....., (a prisoner), did, (at) (on board) ....., on or about ..... 19...., wrongfully [use the following (threatening) (insulting) (threatening and insulting) language] [behave in an (insubordinate) (disrespectful) (insubordinate and disrespectful) manner] toward ....., a (sentinel) (lookout) in the execution of his duty, ["....." or words to that effect] [by .....].

168. In that ....., while posted as a (sentinel) (lookout), did, (at) (on board) ....., on or about ..... 19...., (loiter) (wrongfully sit down) on his post.

Stolen property, knowingly receiving

169. In that ..... did, (at) (on board) ....., on or about ..... 19...., unlawfully (receive) (buy) (conceal) ....., of a value of about $....., the property of ....., which property, as he, the said ....., then well knew, had been stolen.

Straggling

170. In that ..... did, at ....., on or about ..... 19...., while accompanying his organization on (a practice march) (maneuvers) (.....), without just cause, straggle.

Threat, communicating

171. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully communicate to ..... a threat to (injure ..... by .....) (accuse ..... of having committed the offense of .....) (.....).

Unclean accouterment, arms, etc.

172. In that ..... was, (at) (on board) ....., on or about ..... 19...., found with an unclean (rifle) (uniform) (.....), he being at fault in failing to maintain such property in a clean condition.

Uniform, unclean, improper, appearing in

173. In that ..... did, on or about ..... 19...., wrongfully appear (at) (on board) ..... (without his .....) (in an unclean .....) (with an unclean .....) (.....).

Unlawful entry

174. In that ..... did, (at) (on board) ....., on or about ..... 19...., unlawfully enter the (dwelling house) (garage) (warehouse) (tent) (vegetable garden) (orchard) (stateroom) (.....) of .....

Weapon, concealed, carrying

175. In that ..... did, (at) (on board) ....., on or about ..... 19...., unlawfully carry a concealed weapon, to wit: a .....

Wearing unauthorized insignia, etc.

176. In that ..... did, (at) (on board) ....., on or about ..... 19...., wrongfully and without authority wear upon his (uniform) (civilian clothing) [the insignia of grade of a (master sergeant of .....) (chief gunner's mate of .....)] [the Combat Infantryman Badge] [the Distinguished Service Cross] [the ribbon representing the Silver Star] [the lapel button representing the Legion of Merit] [.....].

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 576

CAPTAIN HOWARD BRETT LEVY, FOR HIMSELF AND FOR ALL OTHERS SIMILARLY SITUATED, PETITIONER

v.

HONORABLE HOWARD F. CORCORAN, UNITED STATES DISTRICT JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a captain in the United States Army, seeks review in this Court of a decision of the court of appeals for the District of Columbia (Pet. App. 46–69) denying his application for a writ of mandamus directing respondent, a judge of the United States District Court for the District of Columbia, to convene a three-judge district court under 28 U.S.C. 2282 to hear petitioner's constitutional challenge to court-martial proceedings against him. Petitioner's complaint in the district court sought to enjoin the conduct of the court-martial on the ground

272-486—67——1

that its proceedings, as well as the provisions of the Uniform Code of Military Justice under which he had been charged (10 U.S.C. 890, 933, 934), violated his First Amendment rights. On May 3, 1967, the district court held that it was without jurisdiction to grant a preliminary injunction or to convene a three-judge court (Pet. App. 37–43). On May 9, 1967, the court of appeals (Chief Judge Bazelon dissenting) denied petitioner's application for a stay and for a writ of mandamus (Pet. App. 46–69). A motion for rehearing was denied by the court of appeals on June 7, 1967. Petitioner's application to the Chief Justice for a stay pending the filing and disposition of a petition for certiorari was referred to the full Court and denied on May 22, 1967 (387 U.S. 915). On June 3, 1967, the court-martial that petitioner sought to enjoin entered its judgment convicting petitioner of three charges and dismissing two charges. Military review proceedings are now pending.

The three charges of which petitioner has been convicted may be set forth briefly. Charge I concerned petitioner's duties as an Army doctor assigned to the United States Army Hospital at Fort Jackson, South Carolina, as Chief of Dermatology. The charge alleged that petitioner refused to obey a lawful command from his superior officer to establish and operate a dermatology training program for Special Forces Aidmen, in violation of Article 90 of the Uniform Code of Military Justice, 10 U.S.C. 890 (willful disobedience of the lawful command of a superior commissioned officer). Charge II alleged that petitioner ut-

tered statements to enlisted men "with design to promote disloyalty and disaffection," in violation of Article 134, 10 U.S.C. 934 (disorders and neglects to the prejudice of good order and discipline).[1] A third charge referred to similar statements made by petitioner to enlisted men at Fort Jackson, in violation of Article 133, 10 U.S.C. 933 (conduct unbecoming an officer and a gentleman).[2]

In his complaint in the district court, petitioner sought to enjoin the court-martial from proceeding against him on these charges, and on two other charges which have since been dismissed.[3] With respect to the charge of willfully disobeying the order to establish

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[1] As set forth in the specification of Charge II, the statements in question would appear to advocate disobedience of orders: "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam, by being given all the hazardous duties and they are suffering a majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight."

[2] Included among the statements set forth in the specification to this charge were the following: "I will not train special forces personnel because they are 'liars and thieves,' 'killers of peasants,' and 'murderers of women and children'"; "I would refuse to go to Vietnam if ordered to do so"; "The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey"; "I hope when you get to Vietnam something happens to you and you are injured."

[3] The two charges that have been dismissed related to a letter written by petitioner to a soldier in Vietnam. See Pet. 5–6.

a dermatology training program, petitioner alleged that, although the "stated basis" of the charge was willful disobedience of a lawful command, the charge was "in truth and in fact, based upon the opinions of plaintiff privately and informally expressed on political subjects and his failure to be granted a loyalty security clearance by the G-2 Section of the United States Army" (Complaint, para. 5). With respect to the other charges, petitioner alleged that Articles 133 and 134 of the Uniform Code of Military Justice are unconstitutionally vague and, as proposed to be applied by the court-martial, would violate his First Amendment rights.

The district court held that it had no jurisdiction to enjoin the court-martial proceedings. The court of appeals (Tamm and Leventhal, JJ.) agreed. Chief Judge Bazelon was of the view that a substantial constitutional question requiring the convening of the three-judge court was presented, and that a stay should be issued to preserve the jurisdiction of the court.

1. Petitioner urges that the court below erred in denying him a statutory three-judge tribunal before which to challenge *in limine* the court-martial proceedings against him. We submit on the contrary, that its disposition was correct and that the review of the conviction should go forward in the channels prescribed by Congress.

We begin with the proposition that the courts, for obvious reasons, have always been loath to interfere in the internal discipline of the armed forces. We know of no case in which an injunction against the

conduct of court-martial proceedings has issued. As Judge Leventhal observed below (Pet. App. 48–49), petitioner's prayer "runs into a judicial tradition which for more than 150 years has resisted all efforts to issue mandates intended to obviate exposure to court-martials or anticipate the results of proceedings before military tribunals." See *Wales* v. *Whitney*, 114 U.S. 564; *Gusik* v. *Schilder*, 340 U.S. 128; cf. *Orloff* v. *Willoughby*, 345 U.S. 83, 94. The reasons for such forebearance are illustrated by this case. The most serious charge of which petitioner has been convicted is willfull disobedience of the lawful command of a superior officer. To prevent duly constituted military tribunals from proceeding with their consideration of such a charge would inject civilian courts into the heart of military organization and discipline. There are also serious practical difficulties in summoning military personnel—quite possibly from distant posts and theaters of combat—to appear before civilian courts in order to pre-try military offenses and to appraise the motives of the officers who have pressed charges. Petitioner's attempt to circumvent the statutory procedures for the adjudication and review of military charges does not represent an appropriate invocation of federal equity jurisdiction.

Nor is there any apparent necessity for such an extraordinary judicial undertaking. Petitioner's conviction is now pending before a board of review authorized to reconsider the evidence and to affirm "only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact" (10 U.S.C. 866). From an adverse

determination by the board, petitioner may seek further review before the Court of Military Appeals. 10 U.S.C. 867. See also 10 U.S.C. 871, 874, 1552. Before those tribunals he is free to press his constitutional challenge; if they disagree with his constitutional claims, he may then seek redress in civilian courts. *Burns* v. *Wilson*, 346 U.S. 137.[4]

Petitioner places undue weight on *Dombrowski* v. *Pfister*, 380 U.S. 479. The issue there of course related to the power of the federal courts to enjoin State criminal proceedings. Language in the Court's opinion which might appear broad enough to apply to courts martial must be read in light of the Court's frequent admonition that general language in its opinions must be limited to the context in which uttered. Beyond that, we point out that the State prosecution enjoined in *Dombrowski* (and this against the background of a settled power to enjoin State criminal proceedings, *Ex parte Young*, 209 U.S. 123, which has no parallel in the military area) was based on criminal statutes that the Court found were unconstitutional and void on their face. No such charge has been, or could possibly be, leveled against Article 90 of the Uniform Code of Military Justice, which punishes disobedience of orders and under which the most serious charge against petitioner is

[4] Contrary to petitioner's suggestion (Pet. 27), his release from confinement would not prevent him from obtaining judicial review in an action for declaratory judgment or for back pay. *Gallagher* v. *Quinn*, 363 F. 2d 301 (C.A. D.C.); *Shapiro* v. *United States*, 69 F. Supp. 205 (Ct. Cl.); *Hooper* v. *United States*, 326 F. 2d 982 (Ct. Cl.).

laid. Moreover, the inevitably wide gulf between civilian and military life as regards the balance of freedom and discipline make *Dombrowski's* protective doctrine peculiarly inapposite in the present context. In sum, petitioner has failed to establish the twin requirements for convening a three-judge district court to consider a constitutional challenge: a substantial constitutional question and a basis for equitable relief. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 715.

2. In addition, we believe that petitioner's prayer for injunctive and declaratory relief is, in its essential aspects, moot. The court-martial he sought to enjoin has been held. We do not read his complaint as embracing a prayer to enjoin the pending military review proceedings, which could result in the dismissal of one or more of the charges or in a reduction of sentence and which must be exhausted before he may seek review by habeas corpus. The case, as noted above, is before the board of review, which is prepared to proceed expeditiously.[5]

Petitioner suggests (Pet. 24, n. 3) that the case is not mooted by his conviction because he sues on behalf of all others similarly situated and seeks to enjoin all courts-martial "when the charges therein are alleged violations of Articles 133 or 134 * * * and, when such charges are politically motivated, under Article 90 of the Uniform Code of Military Justice" (Complaint,

[5] Petitioner recently obtained a substantial extension of time within which to make his submission before the board of review.

p. 21). It seems sufficient to say that the substantiality of the questions that might be raised by the members of this suppositious class cannot be assessed on this record.[6]

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

OCTOBER 1967.

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[6] The examples cited in the petition (Pet. 23–24) of allegedly unconstitutional use of courts-martial illustrate the inappropriateness of the generalized injunction petitioner seeks. Thus it seems likely that a soldier who participates in a demonstration while off-duty and in civilian clothes has a more substantial claim to constitutional protection than a private who, while on duty, refuses to obey an order to open his foot locker or an officer who, like petitioner, makes statements to enlisted personnel under his command calculated to promote disobedience.

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